Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Opinion 286 (2013)[1]

Draft Council of Europe convention against trafficking in human organs

Parliamentary Assembly

1. The Parliamentary Assembly welcomes the draft Council of Europe Convention against trafficking in human organs. It recalls that it has been closely involved in the drawing up of this draft convention and, in this connection, refers to its Recommendation 2009 (2013) "Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin", unanimously adopted on 23 January 2013.

2. Given the international dimension of organ trafficking, the Assembly is pleased to see that the future convention reaches beyond the frontiers of the Council of Europe, allowing States that are not members of the Organisation to become parties. It is convinced that this approach will further help to heighten the relevance and visibility of the Council of Europe in the sphere of human rights.

3. However, the Assembly regrets that the draft convention focuses on the criminal aspects of organ trafficking without adequate consideration of matters such as prevention and co-operation. More specifically, it deplores the fact that Article 21.1 – the only article in the draft convention mentioning national prevention measures outside the criminal law context – makes no reference to the issue of organ shortage, even though this is one of the reasons why organ trafficking exists.

4. The Assembly notes that the draft convention gives the parties a free hand in deciding whether or not to punish the donors and recipients involved in organ trafficking. It believes that, in view of the vulnerability of these two categories of people, the future convention should at least guarantee that the penalties that may be applicable to them are fair and proportionate. The Assembly also notes that the draft convention does not contain a provision providing for the elimination of the usual dual criminality rule, which encourages "transplant tourism".

5. The Assembly welcomes the fact that the draft convention provides for a follow-up mechanism but regrets that at the same time there are no reporting requirements for the parties. In these circumstances, the smooth running of the follow-up mechanism will depend on the goodwill of the States and, in all events, the resources allocated to it.

6. The Assembly notes that the current draft convention text is a compromise seeking to strike a balance between the positions of the different parties involved. Nevertheless, it regrets that, in order to arrive at a sufficiently broad consensus, it has been necessary to include the "opt-out clauses" provided for in Articles 9.3, 10.3, 10.5 and 30.2 of the draft convention, permitting reservations that risk weakening the scope of the future convention.

7. In the light of the aforegoing, the Assembly recommends that the Committee of Ministers:

7.1. add a sub-paragraph *d* to Article 21.1, worded as follows:

"that efforts are made to remedy as far as possible the shortage of organs, which is one of the main reasons why human organs are trafficked.";

1. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 22 November 2013 (see Doc. 13338, report of the Committee on Social Affairs, Health and Sustainable Development, rapporteur: Ms Maury Pasquier; and Doc. 13354, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Ghiletchi).

7.2. if the recommendation in paragraph 7.1 is adopted, add the following sentence, concerning Article 21, to the draft explanatory report:

"Measures adopted in respect of Article 21.1.d should be in conformity with the legal and ethical principles underlying the present Convention, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) and its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin (ETS No. 186)";

7.3. add, after the second sentence of paragraph 81, concerning Article 12 relating to sanctions and measures, of the draft explanatory report, a new sentence, worded as follows:

"The term 'proportionate' used in this article implies, where applicable, that any vulnerability of organ donors and recipients, as described in paragraph 94 of this explanatory report, should be taken into consideration when deciding on the penalties that may be applied to them.";

7.4. add a new paragraph to Article 10, after paragraph 3, worded as follows:

"For the prosecution of the offences established in accordance with Articles 4 to 8 of the present Convention, each party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the acts are criminalised at the place where they were performed.";

7.5. provide for an independent, strong and effective committee of the parties assigned with a clear function of co-ordination and monitoring on the basis, *inter alia,* of reporting requirements for the parties;

7.6. in the French version only, replace the word *"application"* appearing in Article 25.1 with the term *"mise en* œuvre*"*, in order to harmonise the terminology used in this article;

7.7. remove the possibilities of making reservations provided for in Articles 4.2, 9.3, 10.3, 10.5 and 30.2. If this recommendation is not followed, the Assembly invites all the States to accede to this convention without making reservations, and calls on the parliaments of the States concerned to be vigilant as regards any reservations their governments may attach to the signature or ratification, acceptance or approval of the future convention.

8. For the reasons set out in paragraphs 2 and 5 of Recommendation 2009 (2013), the Assembly recommends that the Committee of Ministers:

8.1. urge the member States, which, pursuant to Article 4.2, if it is not removed, as recommended by the Assembly, may reserve the right not to apply the provision defining any removal of organs carried out without the free, informed and specific consent of the living donor as illicit, to opt instead to revise their legislation in order to bring it into line with this provision and with the Convention on Human Rights and Biomedicine;

8.2. decide on a road map for the preparation of the additional protocol against trafficking in human tissues and cells.